

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

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75-7017

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P/S

United States Court of Appeals

For the Second Circuit.

AAACON AUTO TRANSPORT, INC.,

Plaintiff-Appellant,

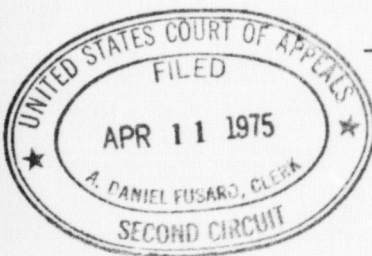
vs.

JOHN BRUIN, d/b/a INTERSTATE AUTO DELIVERY
and INTERSTATE AUTO DELIVERY, INC.,

Defendants-Appellees.

*On Appeal From The United States District Court
For The Southern District Of New York*

APPELLANT'S REPLY BRIEF



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REPLY ARGUMENT

- I. THIS COURT SHOULD CONSIDER THE ISSUES
HEREIN, AND, IF NECESSARY, TREAT THE
INSTANT APPEAL AS A PETITION FOR MANDAMUS

This Court has indicated per Judge Learned Hand that where the transfer of a case has been ordered under facts similar to the instant case, i.e. where all of the criteria for non-transfer are met, this Court should reverse the determination of the District Court Judge so as to avoid a multiplicity of litigation as well as hardship to the plaintiff.

In Point II of appellee's brief, Bruin contends that the issue of the District Court's Order to transfer the cause to a California Federal court is not properly before this Court on appeal.

Assuming arguendo that the Order appealed from is a non-appealable Order, there is precedent in the Second Circuit to treat this appeal as a motion for leave to file a petition for mandamus. The mandamus referred to is a direction by this Court to the District Court to recall its transfer of the case to a California Federal court and to hear and determine the matter itself as though it had never been transferred.

In his brief, appellee relies upon Magnetic Engineering & Mfg. Co. v. Bings Mfg. Co., 178 F.2d 866 (2d Cir. 1950) to establish that the order appealed from herein is not an appealable interlocutory decision.

However, appellee has omitted the fact that, in Magnetic Engineering, Chief Judge Hand discussed this concept at great length and indicated that where plaintiff attempted to appeal a non-appealable order, the Court of Appeals was free to treat the appeal as a petition for mandamus.

In discussing the issues, Judge Hand pointed out that a sense of justice should prompt this Court to grant relief, if possible, by way of mandamus. He went on to state, at page 870:

"For if, on the facts here, the transfer order was improper, plaintiff may be seriously hurt, should he be obliged to wait, for a vacation or reversal of that order, until the completion of a trial in Wisconsin. Indeed, paradoxically, if he must thus wait, and then wins at the end of the trial, the hurt to him, caused by the transfer, will be wholly irreparable."

In continuing his discussion of the right to appeal to the Court of Appeals of the transferee court, Judge Hand noted:

"For I perceive no reason why the Seventh Circuit can better decide the issue than can we. After all, the removal order was made by a District Court within this Circuit. And, if the Seventh Circuit does issue a writ the situation will become involved: That Circuit Court will direct the District Court in Wisconsin to re-transfer the case to the Court below. But the Court below will not be subject to a re-transfer order entered by the Seventh Circuit, and might, refusing to comply with that order, again transfer the case to Wisconsin."

Chief Judge Friendly discussed this concept at length in International Products Corporation v. Koons, 325 F.2d 403 (2d Cir. 1963) at page 407.

Judge Friendly observed that the only justification for treating a non-appealable order as a petition for mandamus would be a desire to afford an opportunity for response by the District Judge. The opinion continued:

"Since this opportunity is rarely availed of, a suitable accommodation can be reached by treating such an appeal, in an appropriate case, as a motion for leave to file a petition for mandamus. An expression of this Court's views on such a motion will generally obviate any need for a petition or a writ, while still leaving it open to the judge to await a formal petition in the rare case where he wishes to be heard."

See also Western Geophysical Co. v. Bolt Associates, 440 F.2d 765, 769 (2d Cir. 1971).

It is evident that the rule in this Circuit is that the Court of Appeals is free to treat this appeal as a petition for mandamus. We respectfully suggest that this is an appropriate case in which it should do so and that it should direct the Court below to recall the transfer and try the case as though it had not been transferred.

II THE COURT BELOW GROSSLY ABUSED ITS DISCRETION
IN DENYING THE INJUNCTION AND IN TRANSFERRING
THE MATTER TO CALIFORNIA

Aaacon respectfully submits that the record evinces undisputed facts which constitute the clearest possible case for denying a motion for change of venue:

1. Six of the seven witnesses in the instant case (this includes all of the witnesses for both sides) are located in the Greater New York area or within 100 miles. Considerable unnecessary expense would be incurred by Aaacon in transporting these six witnesses to California as well as in maintenance costs during the trial.

2. All of the voluminous documentary evidence to be relied on by plaintiff in proving its case are located in New York City.

3. The parties have consented in their agreement that the law of New York be applied.

4. The case involves an agreement not to compete after termination of a business relationship upon which the law of New York and the law of California (the latter being the situs to which the case was transferred) are diametrically opposed.

5. The situs of transfer, California, has indicated in its decisions an open hostility to the concept of the agreements not to compete.

Aacon respectfully submits that the Court below erred in both denying the preliminary injunction and in transferring the case to California since it arrived at this two-fold decision without considering the actual sworn testimony before it. It actually based its decisions on pure speculation, in contradiction to the sworn evidence submitted to him.

We respectfully call the attention of this Court to page 2 of appellee's brief in which he sets forth verbatim a portion of the dialogue at the hearing of the Order to Show Cause and Cross Motion. We particularly note on that page the first quotation of the remarks made by the Court:

"Who is going to testify at this hearing?
All these people in California? What are
you going to do, bring them all here?"
(Emphasis added).

It is vital to digress for a moment to emphasize that the only sworn testimony before Judge Bonsal, in the form of affidavits, indicated without dispute that there will be six important Aacon witnesses ready and available to testify at the trial in New York. The uncontradicted additional sworn testimony is that only Bruin himself would testify on his behalf at the trial.

Accordingly, we respectfully raise the question, "All what people in California?" (referring to supposed witnesses for Bruin.)

What people did Judge Bonsal refer to? The record is completely barren of any reference to witnesses who would testify on Bruin's behalf -- with the exception of himself.

Furthermore, in the next quotation on page 2 of appellee's brief, the Court states, inter alia:

"...it seems to me that...the testimony is going to be out there, and I don't see why we ought to bring a lot of Californians to New York to testify about that."
(Emphasis added).

Again, we respectfully ask, "What Californians?". There was absolutely no testimony before the Court below of anyone testifying for Bruin but himself.

Appellee correctly states on page 12 of his brief that Aaacon has urged that "six vital witnesses" will be required to testify for it at the trial of this action. We respectfully emphasize that each of these witnesses was identified by name, employment and address. In addition, the sworn testimony indicates the extent of their testimony and the bearing it would have upon the cause before the Court.

Appellee did not see fit to contest the foregoing in the Court below. Instead, the proposed testimony is attacked in a purely speculative manner by counsel for Bruin in his brief. It is futile for him to assume, for any purpose whatsoever, as to what additional testimony would be given

by the named witnesses. On the contrary, we cannot help but wonder why Bruin failed in the Court below to identify any witness or witnesses who would testify on his behalf except himself.

The conclusions, therefore, of the Court below were highly speculative and not based on any testimony before it. Consequently, we urge that this was a gross abuse of discretion.

In addition, we note the case cited almost tangentially in the footnote at page 6 of appellee's brief: Wyndham Associates v. Blintliff, 398 F.2d 614 (2d Cir. 1968).

However, Bruin's counsel did not state that, in Wyndham, at 619, Chief Judge Lumbard referred to plaintiffs' contention that the District Court abused its discretion in transferring to Texas the action against six defendants. The Court noted plaintiffs' contention that special weight should be given to (a) plaintiffs' choice of forum, (b) that the witnesses, who were specifically identified (as herein), as well as the documents which plaintiffs intended to use were for the most part located in New York, and that (c) transfer to Texas would severely handicap the plaintiffs' case by depriving them of the live testimony of these witnesses. Chief Judge Lumbard continued at page 619:

"Certainly, these considerations are entitled to serious consideration in determining whether a transfer would be in the interest of justice."

Judge Lumbard decided that in Wyndham the considerations mentioned were outweighed by other factors. However, the other factors that influenced this Court in Wyndham have no similarity to the case at bar. In that case, there were two pending actions relating to the same matters -- one in the Southern District of Texas and the other in the Southern District of New York. Judge Lumbard concluded:

"The relative calendar conditions of the two courts involved are a factor which the court may properly consider on a motion to transfer. It is clear that this factor supports transfer in this case, as calendar conditions in the District Court in Houston will permit a much earlier trial than could be had in the Southern District of New York." (Emphasis added).

It is apparent that in Wyndham the situation is far different from the one at bar. It involved a consolidation of two pending matters each in a different Federal district court. Purely on the basis of the "relative calendar condition of the two courts involved", the Second Circuit upheld the transfer. We respectfully submit that it is fair to assume that, had there been no problem of consolidation and no issue of "relative calendar conditions", this Court would not have supported the transfer of the case to Houston in Wyndham.

We respectfully submit that Judge Bonsal's Order is a gross abuse of discretion which will cause extreme hardship upon Aaacon in view of the fact that six vital witnesses will be compelled to travel to California for the trial. It should be noted parenthetically that at least one of the witnesses (Allen Herman), who is not affiliated with Aaacon, has stated that he can testify only if the hearing is held in New York. In addition, as has been submitted by Aaacon in affidavit form, and not contradicted, all of the essential documents which will enable it to establish its case are located in New York City. Both of the foregoing factors will cause Aaacon considerable inconvenience and expense in the event that the Order entered below is not reversed.

III. THE APPELLEE IS IN ERROR WHEN HE STATES
THAT THE DISTRICT COURT DID NOT "REFUSE"
THE INJUNCTIVE RELIEF SOUGHT BY AAACON

We note that the validity of the agency agreement containing the restrictive covenant, which agreement is the basis of the relief sought below, is not in dispute. Appellee does not deny the signing of the agreement by both parties nor that the parties acted under the agreement until its culmination.

Accordingly, appellee's argument that the District Court did not "refuse" the injunctive relief sought by Aaacon is specious. By failing to grant the preliminary injunction, the Court below allowed Bruin to continue violating the restrictive covenant of the agreement. We submit that the failure to act was a denial of the injunctive relief requested. Any other interpretation would seem to be tortured and would be playing with semantics.

Appellee further argues that "it is clear from the context that the 'denial without prejudice' is purely incidental to the portion of the order which transferred the matter to the Central District of California."

~~—————~~ We respectfully submit that such conclusion is not as clear as it appears to appellee. The denial of the preliminary injunction can hardly be called "purely incidental" when

the Court below could very well have granted the preliminary injunction and still transferred the case to the California Federal Court. Conversely, it could have granted the injunction and could have declined to transfer. Neither act was, or is, dependent upon the other and, thus, neither can be described as "purely incidental" to the other.

Each of the cases cited by appellee on pages 3 and 4 of his brief in support of his contention that deferment to another day on the matter does not constitute a "refusal" to dissolve or grant an injunction are entirely inapposite. In each of these cases the lower Court Judge was making a ruling as to the manner in which he himself would try an issue in a civil action pending before himself. In other words, each ruling was purely a local internal decision. This is hardly the case in the instant matter where the judge below, in effect, did not defer the ruling upon the injunction (despite the language of "without prejudice" used by him). On the contrary, he actually denied the application since he was not taking a step in controlling the litigation before him. He sent it out of the district and that is the focal issue in the matter at bar.

CONCLUSION

In view of the foregoing, as well as all other papers submitted to this Court, the appellant respectfully urges that the Order of the Court below be reversed and that a mandamus be

issued directing the Court below to recall the case transferred to California.

Respectfully submitted,

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Michael G. Ames
Of Counsel

By Michael G. Ames
Michael G. Ames

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, State Island, N.Y. 10302. That on the 11 day of April, 1975 deponent served the within *Brief* upon *Russell + Schurman*

attorney(s) for *APR*

in this action, at

*1545 Walsingham Blvd.
L.A. Calif*

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

[Signature]
ROBERT BAILEY

Sworn to before me, this
day of *April*, 1975.

[Signature]
WILLIAM BAILEY

Notary Public, State of New York
No. 43 0132945

Qualified in Richmond County
Commission Expires March 30, 1976

